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**STATE OF CALIFORNIA, DIVISION OF LABOR
STANDARDS ENFORCEMENT, DIVISION OF
APPRENTICESHIP STANDARDS, DEPARTMENT OF
INDUSTRIAL RELATIONS and COUNTY OF SONOMA,**

Petitioners,

v.

**DILLINGHAM CONSTRUCTION, N.A., Inc. and
MANUEL J. ARCEO, dba SOUND SYSTEMS MEDIA,**

Respondents.

**On Writ of Certiorari To The
United States Court of Appeals for the Ninth Circuit**

**BRIEF FOR THE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA AND THE NATIONAL
ASSOCIATION OF MANUFACTURERS AS AMICI
CURIAE IN SUPPORT OF RESPONDENTS**

Of Counsel

STEPHEN A. BOKAT

Mona C. Zilberg

**NATIONAL CHAMBER LITIGATION
CENTER, INC.**

1615 H Street, N.W.

Washington, D.C. 20062-2000

(202) 463-5337

JAN S. AMUNDSON

QUINTIN REICHEL

**NATIONAL ASSOCIATION OF
MANUFACTURERS**

1331 Pennsylvania Ave., N.W.

North Tower, Suite 1500

Washington, D.C. 20004-1790

(202) 637-3036

TIMOTHY B. DYK

(COUNSEL OF RECORD)

DANIEL H. BROMSBERG

JONES, DAY, REAVIS & FOGUE

1450 G Street, N.W.

Washington, D.C. 20005

(202) 879-3939

*Counsel for the Chamber of
Commerce of the United States
of America and the
National Association of
Manufacturers*

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INTEREST OF AMICI CURIAE¹

The Chamber of Commerce of the United States of America (the "Chamber"), a nonprofit corporation organized and existing under the laws of the District of Columbia, is the largest federation of business, trade, and professional organizations in the United States. The Chamber represents the interests of over 215,000 corporations, partnerships, and proprietorships, as well as several thousand state and local chambers of commerce and trade and professional associations.

The National Association of Manufacturers (the "NAM") is the nation's largest broad-based industrial trade association. It represents nearly 14,000 companies. These companies employ approximately 85% of the manufacturing workers in the United States and produce over 80% of the nation's manufactured goods. An additional 158,000 businesses are affiliated with the NAM through its Associations Council and National Industrial Council. Both the Chamber and the NAM regularly represent the interests of their members in matters before the courts, the United States Congress, the Executive Branch, and independent federal regulatory agencies.²

Most of the companies represented by the Chamber and the NAM provide their workers with pension and welfare benefits. Administering these benefits is often a complex and expensive undertaking. It is necessary, among other things, to determine

¹ Petitioners as well as respondents have consented to the filing of this brief. Their letters of consent have been filed with the Clerk pursuant to Rule 37.3(a) of this Court.

² The Chamber and the NAM are also members of the Coalition to Preserve ERISA Preemption. In 1991, as part of that coalition, representatives of the Chamber and the NAM testified before the House Subcommittee on Labor-Management Relations in opposition to a bill that would have exempted state prevailing wage laws from preemption under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* The Chamber and the NAM also opposed a similar bill introduced in 1993.

the eligibility of plan participants (who may, in a Fortune 500 company, number in the tens of thousands), calculate benefits levels, make disbursements, monitor the availability of funds, and maintain appropriate records. The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, imposes comprehensive and detailed regulations upon the administration of pension and welfare benefits plans. To minimize the burden of complying with these regulations, ERISA preempts state and local regulations that "relate to" ERISA-covered plans.

Before this Court, the State of California and the County of Sonoma ("Petitioners") have argued that state and local regulation of government contracting should be immune from preemption under ERISA. Many Chamber and NAM members sell products or services to state and local governments. If this Court were to recognize the immunity Petitioners propose, state and local governments would be free to impose new regulations on benefits plans maintained by their contractors. Such regulation would be in addition to, and potentially in conflict with, both ERISA and the regulations of other state and local governments. An immunity for state laws regulating government contractors would also subject businesses to different requirements for those operations that relate to government contracting and those that do not. Such complex and potentially inconsistent new regulation would greatly increase the costs of compliance, create waste and inefficiency, and force some companies to either reduce benefits or eliminate benefits plans altogether.

Allowing differing and potentially inconsistent state and local regulation of benefits plans would directly contradict Congress' intentions in enacting ERISA and this Court's construction of ERISA's preemption clause. Because of the importance of these matters to their members and to the nation as a whole, the Chamber and the NAM have a vital interest in this case.

INTRODUCTION AND SUMMARY

This brief focuses on a single argument advanced by the Petitioners and their *amici*: that state laws governing public

contracting are immune from preemption under ERISA. *See* Pet. Br. at 23, 29; Brief of the AFL-CIO at 21. This argument has no basis either in ERISA or in the decisions of this Court.

1. The immunity that Petitioners propose cannot be squared with ERISA's preemption clause. The history, language, and purpose of ERISA all preclude any immunity for state laws regulating government contracting. In enacting ERISA, Congress made a conscious decision to sweep away the hodgepodge of state laws that had previously governed benefits plans and make the administration of such plans an exclusively federal concern. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). Accordingly, Congress included in ERISA one of the broadest preemption clauses in federal law. That clause provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by the statute. 29 U.S.C. § 1144(a) (1994). There is no logical way to construe this language so that state laws "relate to" ERISA-covered plans when they regulate government contractors but not when they impose the same regulations on purely private employers. *See Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988).

Nor is it conceivable that Congress intended to authorize the courts to create implied exemptions to ERISA preemption. While ERISA specifically exempts state laws regulating insurance and other enumerated areas of traditional local concern, *see* 29 U.S.C. § 1144(b), there is no exemption for laws regulating government contracting. This omission is significant. In a statute as detailed and comprehensive as ERISA, it cannot be seriously argued that Congress intended implicit exemptions in addition to the ones it specifically enumerated. *See Mackey*, 486 U.S. at 837; *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).

Just as importantly, the immunity Petitioners propose cannot be reconciled with the goals of ERISA preemption. Congress intended ERISA's expansive preemption clause to "afford employers the advantages of a uniform set of administrative

procedures governed by a single set of regulations." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987). Immunizing state laws regulating government contracting from preemption would undermine this goal by subjecting benefits plans to differing regulation by the federal government and by a multitude of state and local governments. Such an immunity would also subject employers to separate regulations for their government contracting operations. In short, the immunity that Petitioners propose would create the very patchwork of regulation that Congress intended ERISA's preemption clause to prevent.

Nor do this Court's decisions support Petitioners' immunity argument. This Court has never recognized any immunity from preemption, presumptive or otherwise, for state laws regulating government contracting. To the contrary, in *Wisconsin Department of Industry, Labor & Human Relations v. Gould Inc.*, 475 U.S. 282 (1986), this Court found a Wisconsin law regulating government contracting preempted without any suggestion that such laws are immune from preemption. Nor is this Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671 (1995), to the contrary. In *Travelers*, this Court found a New York law regulating hospital rates was not preempted because it did not refer to any ERISA plan and only indirectly affected the administration of such plans. While *Travelers* referred to the presumption that Congress did not intend to preempt state laws regulating traditional areas of local concern, this Court applied the presumption only after determining that the state law at issue neither referenced nor directly affected an ERISA plan. Nothing in that opinion even remotely suggests that Congress intended to generally immunize traditional state laws from preemption, and any presumption to that effect would directly conflict with Congress' goal of eliminating state regulation in areas of traditional state concern that "relate[s] to" ERISA plans.

2. California's prevailing wage law is not saved by any exception for proprietary conduct. Relying on decisions under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, Petitioners argued before the Ninth Circuit that California's

prevailing wage law was not preempted because it was proprietary in nature. As Petitioners have not advanced this argument here, this Court should decline to consider it.

If this Court does consider the proprietary conduct issue, it should reject Petitioners' argument. ERISA's preemption clause does not permit an exception for proprietary conduct affecting the ERISA plans of government contractors. An exception for proprietary conduct would undermine the clause's goal of uniform and exclusive federal regulation by permitting state and local governments to impose supplemental, and potentially conflicting, requirements on government contractors. In any event, under the standards developed in NLRA cases, California's prevailing wage law is not proprietary. The prevailing wage law is an exercise of governmental, not contractual, power; there is no evidence that the law imposes requirements typical of those imposed by private actors; and the law plainly furthers regulatory, rather than proprietary, interests.

ARGUMENT

I. STATE LAWS THAT REGULATE GOVERNMENT CONTRACTING ARE NOT IMMUNE FROM PREEMPTION UNDER ERISA.

Under California's prevailing wage law, Cal. Lab. Code §§ 1770-80, state contractors must generally pay employees working on state public works projects the journeyman wage prevailing in the area. *See id.* § 1771 (West 1989). These contractors may, however, pay apprentices a lower wage if those apprentices are enrolled in an apprenticeship program approved by the State. *See id.* § 1777.5 (West Supp. 1996). Before this Court, Petitioners and their *amici* argue that, whatever its effect on apprenticeship programs subject to regulation under ERISA, the prevailing wage law is not preempted by ERISA because the law regulates government contracting. Pet. Br. at 21, 23-29; Brief of the Council of State Governments at 8-10 [hereinafter, State Gov. Br.]. Specifically, they assert that state laws regulating

government contracting and other areas of traditional state concern are immune from preemption under ERISA unless preemption of the law in question "was the clear and manifest purpose of Congress." Pet. Br. at 21 (quotation omitted); *see also id.* at 8. This assertion conflicts with both ERISA and the decisions of this Court.

A. ERISA Preempts State Laws That Relate To ERISA Plans Even When Those Laws Regulate Government Contracting.

As this Court has observed, ERISA contains a "deliberately expansive" preemption clause. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987). The history, language, and purpose of this clause clearly preclude any immunity from preemption, presumptive or otherwise, for state laws regulating government contracting.

History — Historically, welfare and pension plans were subject to regulation under state laws governing a number of areas of traditional local concern, including trusts, insurance, banking, and fiduciary responsibilities. *See* D. McGill & D. Grubbs, Jr., *Fundamentals of Private Pensions* 47-48 (6th ed. 1989); *see generally* H. Rep. No. 533, 93d Cong., 1st Sess. 3-5 (1973). In 1958, with the Welfare and Pension Plan Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997, *repealed by* 29 U.S.C. § 1031(a), Congress attempted to encourage state regulation more specifically targeted at pension and welfare plans. *See Malone v. White Motor Co.*, 435 U.S. 497, 511 (1978) (plurality opinion). When such regulations failed to materialize, Congress adopted a different approach. In enacting ERISA, Congress decided to sweep away the hodgepodge of state laws regulating ERISA plans and to "establish pension plan regulation as exclusively a federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981) (footnote omitted). Petitioners' assertion that Congress intended to immunize "traditional exercises of state authority" from preemption under ERISA (State Gov. Br. at 8) cannot be reconciled with this history.

Language — Petitioners' immunity theory also conflicts with the language of ERISA. As this Court has recognized, ERISA's preemption clause is "conspicuous for its breadth." *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990). The clause provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). The clause makes no distinction between laws that regulate government contractors and laws that do not. As a consequence, to paraphrase this Court, "there is simply no logical way to construe the English language so that [state] laws 'relate to' benefits plans when they [regulate government contractors], but not when they [regulate purely private sector employers]." *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 836 (1988) (quotation omitted). If a state law regulates an ERISA plan, it "relate[s] to" that plan whether or not the plan is operated by a government contractor. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983) ("A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.") (footnote omitted).

This conclusion is confirmed by the specific exemptions in the preemption clause. ERISA exempts from preemption state laws regulating insurance, banking, and securities, as well as "[g]enerally applicable criminal law[s]" 29 U.S.C. §§ 1144(b)(2)(A) & (b)(4). There is, however, no exemption for state laws regulating government contracting. "In a comprehensive regulatory scheme like ERISA, such omissions are significant ones." *Mackey*, 486 U.S. at 837; *see also Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) (rejecting any "assumption of inadvertent omission" in ERISA). That a statute as comprehensive as ERISA specifically exempts from preemption state laws regulating certain areas of traditional concern demonstrates Congress' intention *not* to exempt state laws regulating other areas. *See* 2A N. Singer, *Sutherland on Statutory Construction* § 47.23, at 217 (5th ed. rev. ed. 1992) ("The enumeration of exclusions from the operation of a statute

indicates that the statute should apply to all cases not specifically excluded.”) (footnote omitted).

Purpose — An immunity for state laws regulating government contracting would also conflict with the purposes underlying ERISA’s preemption clause. The preemption clause was not, as some *amici* have suggested (*see* State Gov. Br. at 5, 11), merely intended to eliminate conflicting state regulations. An express preemption clause is not needed to do that. *See, e.g., English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). ERISA’s broad preemption clause was designed instead to “minimize the administrative and financial burden” of complying with a variety of different regulations, a burden that is felt even in the absence of conflicting regulations. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990).

As this Court has recognized, the most efficient way to administer a benefits program is “to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits.” *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987).

Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States. A plan would be required to keep certain records in some States but not in others; to make certain benefits available in some States but not in others; to process claims in a certain way in some States but not in others; and to comply with certain fiduciary standards in some States but not in others.

Id. at 9 (citation omitted). Accordingly, ERISA’s preemption clause is designed to “afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations.” *Id.*; *see also New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1677-78 (1995) (“The basic thrust of the pre-emption clause, then, was to avoid a multiplicity of regulation in order to permit

the nationally uniform administration of employee benefit plans.”) [hereinafter, *Travelers*].

An exemption for state laws regulating government contracting would directly undermine this goal. If each and every state and local government could regulate the ERISA plans of the companies with which they do business, those companies would be subject to the very patchwork of regulation that Congress intended the preemption clause to eliminate. Indeed, under Petitioners’ theory, companies would not only face potentially differing regulation from the federal government and a multitude of state and municipal governments; they might also be forced to distinguish between their public and private sector operations. Plainly, such a “patchwork scheme of regulation would introduce considerable inefficiencies.” *Fort Halifax*, 482 U.S. at 11. Moreover, as state and local government procurement constitutes approximately 9% of the gross domestic product, *see Statistical Abstract of the United States* 451 (115th ed. 1995), the adverse effects of such inefficiencies would be felt throughout the economy.

The immunity that Petitioners propose would also inevitably generate litigation. There would be suits over how exactly to draw the line between public contracting and purely private sector activity. There would also be suits over whether to extend any immunity for laws regulating public contracting to laws regulating other areas of traditional state concern. A subsidiary purpose of ERISA’s preemption clause was, however, to avoid “endless litigation over the validity of State action that might impinge on Federal regulation.” *Shaw*, 463 U.S. at 99 n.20 (quoting 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits)). Recognizing an immunity for state laws regulating government contracting would undermine this purpose as well.

B. This Court Has Not Recognized Any General Immunity From Preemption For State Laws Regulating Government Contracting.

In *Wisconsin Department of Industry, Labor & Human Relations v. Gould Inc.*, 475 U.S. 282 (1986), this Court

considered whether the NLRA preempted a Wisconsin law barring three-time violators of the NLRA from state contracting. The Court found that the Wisconsin law conflicted with the NLRA by providing remedies not available under the statute. *See* 475 U.S. at 286 (noting that in a complex federal scheme such as the NLRA “conflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy”) (quotation omitted). This Court therefore held the Wisconsin law preempted. *See id.* at 286-87.

Although the Wisconsin law plainly regulated government contracting, this Court did not suggest that the Wisconsin law was immune, presumptively or otherwise, from preemption. To the contrary, this Court expressly rejected the State’s argument that the law escaped preemption because it was an exercise of the State’s spending power. *See Gould*, 475 U.S. at 289-91. In this Court’s view, “That Wisconsin has chosen to use its spending power rather than its police power does not significantly lessen the inherent potential for conflict when two separate remedies are brought to bear on the same activity.” *Id.* at 289 (quotation omitted). By the same token, that California’s prevailing wage law regulates public contracting does not significantly lessen the potential that the law will “relate to” an ERISA plan. Accordingly, the fact that a state law which relates to an ERISA plan also regulates government contracting should make no difference for purposes of ERISA’s preemption clause.

Neither Petitioners nor their *amici* discuss — much less attempt to distinguish — this Court’s decision in *Gould*. They rely instead upon this Court’s recent decision in *Travelers*. Based upon a single passage from that opinion,³ Petitioners and their

³ The passage in question states:

where federal law is said to bar state action in fields of traditional state regulation, we have worked on the “assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”

amici contend that all state laws regulating traditional areas of local concern are presumptively immune from preemption. *See* Pet. Br. at 21, 23; State Gov. Br. at 8-10. *Travelers* establishes no such presumption.

In *Travelers*, a group of commercial insurers challenged a New York law regulating the rates for in-patient hospital care and imposing a 13% surcharge on commercial insurers. *See* N.Y. Pub. Health Law § 2807-c(1)(b) (McKinney 1993 & Supp. 1996); *see also id.* §§ 2807-c(2-a) & 11(i) (imposing additional surcharges during 1993). The Second Circuit held that the surcharge law “relate[d] to” an ERISA plan (and was therefore preempted by ERISA) because the law encouraged ERISA plans and other purchasers of insurance to choose non-profit insurers such as Blue Cross/Shield over commercial insurers by increasing the cost of commercial insurance. *See Travelers*, 115 S. Ct. at 1675-76. This Court unanimously reversed. In its view, the surcharge law did not “bear the requisite ‘connection with’ ERISA plans to trigger pre-emption.” *Id.* at 1680.

Contrary to Petitioners’ suggestion, *Travelers* did not start with the presumption that the surcharge law was immune from preemption because it regulated an area of traditional local concern. This Court began instead with the text of ERISA’s preemption clause and the “objectives of the ERISA statute.” *Travelers*, 115 S. Ct. at 1677. It found neither dispositive because the surcharge law neither referred to nor directly affected an ERISA plan. The law instead had at best an “indirect economic effect” on ERISA plans. *Id.* at 1679. Indeed, this Court observed, there was “nothing remarkable” about the law’s effect on plan administrators. *Id.*; *see also id.* (noting that the surcharge law did “not bind plan administrators to any particular choice”). As a consequence, to find New York’s surcharge law preempted, this Court would have to find all state laws regulating health care costs preempted as well. *See id.* at 1680. Since

Travelers, 115 S. Ct. at 1676 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (other citations omitted).

"nothing in the language of the Act or the context of its passage indicates that Congress chose to displace general health care regulation, which has historically been a matter of local concern," this Court refused to do so. *See id.* (citations omitted); *see also id.* at 1681-82 (noting that any other interpretation would conflict with the National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, 88 Stat. 2225).

There is no suggestion in *Travelers* that state laws referring to ERISA plans or directly affecting their administration are immune from preemption when those laws regulate areas of traditional state concern. Nor could there be. As demonstrated above, *see supra* pp. 6, 8-9, the very purpose of the preemption clause was to sweep away state laws regulating ERISA plans and ensure uniform federal regulation of plan administration. Moreover, the inclusion of specific exemptions for certain areas of traditional state regulation from preemption precludes implication of further exemptions. *See supra* pp. 7-8. As a consequence, the presumption that Congress did not intend to bar all state action in fields of traditional state regulation has only limited application under ERISA. It plays a role only where, as in *Travelers*, a state law does not refer to ERISA plans and the law's only effect on those plans is indirect. Thus, while the presumption may help to define the outer reaches of ERISA's preemption clause, it plainly does not immunize traditional state laws from preemption when they refer to or directly affect ERISA plans.

II. CALIFORNIA'S PREVAILING WAGE LAW CANNOT BE SAVED BY CHARACTERIZING IT AS PROPRIETARY.

Before the Ninth Circuit, Petitioners argued that their conduct was proprietary and therefore not subject to preemption. The Ninth Circuit rejected this argument, *see Dillingham Constr., N.A., Inc. v. County of Sonoma*, 57 F.3d 712, 721-22 (9th Cir. 1995), and Petitioners have not advanced this theory in either their petition for *certiorari* or their brief on the merits. As a consequence, despite the fact that some *amici* have addressed this

issue,⁴ this Court should decline to do so. *See United States v. IBM*, 116 S. Ct. 1793, 1801 (1996); *Posters 'N' Things, Ltd. v. United States*, 114 S. Ct. 1747, 1755 (1994).⁵ If, however, this Court does consider the proprietary conduct argument, it should reject the argument because ERISA's preemption clause does not contain any exception for proprietary conduct and because the prevailing wage law is, in any event, not proprietary.

A. ERISA's Preemption Clause Does Not Contain An Exception For Proprietary Conduct.

ERISA's preemption clause neither contains nor permits an exception for proprietary conduct that would allow states to dictate the terms of the ERISA plans operated by their government contractors. The preemption clause applies to "any and all State laws" that relate to ERISA plans. 29 U.S.C. § 1144(a). Furthermore, the term state law is defined expansively for purposes of the preemption clause: according to a special definition applicable to the preemption clause, the term state law "includes all laws, decisions, rules, regulations, or other State action having the effect of law." *Id.* § 1144(c)(1). While some individual purchasing decisions might fall outside this definition, California's prevailing wage law plainly does not because it undoubtedly has "the effect of law." Before the Ninth Circuit,

⁴ The AFL-CIO raised the proprietary conduct argument in its brief in support of the petition (*see* Brief of the AFL-CIO in Support of Petition at 15-20), and the Associated General Contractors, in anticipation of a similar argument on the merits, opposed the argument in their brief on the merits (*see* Brief of the Associated General Contractors of America at 18-22). Ultimately, however, the AFL-CIO chose not to argue for a proprietary conduct exception in its brief on the merits.

⁵ This Court should also decline to address the proprietary conduct argument because it does not fall within the scope of the question presented. *See* Pet. i (asking whether Congress intended to preempt "states' traditional *regulation* of wages, apprenticeship and state-funded public works construction when expressed in a state prevailing wage law") (emphasis added).

Petitioners nonetheless argued that this Court's decision in *Building & Construction Trades Council of the Metropolitan Dist. v. Associated Builders & Contractors of Mass./Rhode Island*, 507 U.S. 218 (1993) [hereinafter, *Boston Harbor*], supports a proprietary conduct exception. See *Dillingham*, 57 F.3d at 721. While *Boston Harbor* did recognize a distinction between regulatory and proprietary conduct, it did so under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, not ERISA. Moreover, this Court's reasoning in *Boston Harbor* is not in any way applicable to ERISA.

In *Boston Harbor*, a Massachusetts state agency was under a court-imposed deadline to bring Boston Harbor into compliance with the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* See *Boston Harbor*, 507 U.S. at 220-21. To prevent labor unrest from jeopardizing the agency's ability to meet this deadline, the agency entered into a "pre-hire" agreement with a local union requiring, among other things, that contractors and subcontractors on the project use unionized workers. See *id.* at 221-22. A group of contractors and subcontractors challenged the agreement, arguing that it was preempted by the NLRA. This Court disagreed. It found that the agency, in entering into an agreement "specifically tailored to one particular job," was "act[ing] just like a private contractor would act," and was "therefore subject to neither" of the NLRA preemption principles invoked by the contractors and subcontractors. *Id.* at 232-33 (quotation omitted).

In so holding, this Court did not suggest that an exception for proprietary conduct should be carved out from other statutes. Recognizing that the NLRA "contains no express preemption clause," this Court reasoned that a proprietary conduct exception was "consistent with [the] NLRA preemption principles" invoked by the plaintiffs. *Boston Harbor*, 507 U.S. at 224, 230. The first of these principles, known as *Garmon* preemption, forbids state and federal courts from interfering with the National Labor Relations Board's primary jurisdiction to determine whether activities are prohibited or protected by the NLRA. See *id.* at 224-25; see generally *Sears, Roebuck & Co. v. San Diego Dist.*

Council of Carpenters, 436 U.S. 180, 190-212 (1978). The second principle, known as *Machinists* preemption, forbids interference with the use of strikes, lockouts and other forms of economic pressure during collective bargaining. *Boston Harbor*, 507 U.S. at 226 (quotation omitted); see generally *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 144 (1976) (noting that Congress intended the collective bargaining process to be "left for the free play of contending forces") (quotation omitted).

The pre-hire agreement in *Boston Harbor* did not conflict with the principles underlying either *Garmon* or *Machinists* preemption. The agreement did not intrude upon the NLRB's exclusive jurisdiction. Nor did it interfere with the free play of economic forces. Indeed, in this Court's view, the state agency's decision to enter into a pre-hire agreement "exemplifie[d]" the operation of market forces. *Boston Harbor*, 507 U.S. at 233 (quotation omitted). Accordingly, this Court found that the NLRA did not preempt the pre-hire agreement. See *id.* at 232-33.

The situation here is quite different. ERISA, unlike the NLRA, has a preemption clause. Unlike *Garmon* and *Machinists* preemption, the clause is not designed to protect the primary jurisdiction of any administrative agency or to preserve any portion of pension regulation for the free play of economic forces. ERISA preemption is designed to "avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *Travelers*, 115 S. Ct. at 1677-78. Exempting conduct, proprietary or otherwise, that imposes administrative burdens upon ERISA plans operated by government contractors would frustrate this purpose. As a consequence, ERISA cannot be interpreted to contain any exemption from preemption for proprietary conduct that would allow the states to dictate the terms of ERISA plans operated by their government contractors.

B. The Prevailing Wage Law Is Regulatory, Not Proprietary.

Even if there were some basis for exempting proprietary conduct from preemption under ERISA, that exemption would not apply here because the conduct at issue in this case is not proprietary under *Boston Harbor*.⁶

First, unlike the pre-hire agreement in *Boston Harbor*, California's prevailing wage law is not a contractual provision "specifically tailored to one particular job." *Boston Harbor*, 507 U.S. at 232. California's prevailing wage statute is a law, duly enacted by the California legislature, and it is contained in California's *labor*, not its public contracting, code. See Cal. Lab. Code § 1777.5. Furthermore, the prevailing wage law applies even where the contracting agency has failed to incorporate its terms into the agreement with the government contractor. See *Lusardi Constr. Co. v. Aubry*, 824 P.2d 643, 648-50 (Cal. 1992) (en banc). Thus, the prevailing wage law is an exercise of governmental power, and therefore regulatory rather than proprietary in nature. Cf. *Gould*, 475 U.S. at 290 (noting that government conduct is subject to "special restraints" because "government occupies a unique position of power in our society").

Second, there has been no showing here that the State of California was "acting as a typical proprietor" when it enforced its prevailing wage law. *Boston Harbor*, 507 U.S. at 229. The prevailing wage law requires contractors to pay apprentices "the standard wage paid to apprentices," to provide them with "training under apprenticeship standards and written apprentice agreements," and to employ at least "one apprentice for each five

⁶ In *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1332-39 (D.C. Cir. 1996), the United States Court of Appeals for the District of Columbia Circuit held that an Executive Order prohibiting employers who use permanent replacement workers from contracting with the federal government was regulatory, not proprietary, and therefore invalid under the NLRA.

journeymen." Cal. Lab. Code § 1777.5. Although *amici*'s members include thousands of United States businesses, *amici* are unaware of any private business that imposes similar requirements. In fact, it defies common sense to suppose that private businesses would routinely impose such expensive and inefficient requirements on their contractors. As a consequence, unlike the pre-hire agreement in *Boston Harbor*, the restrictions at issue in this case cannot be deemed typical of the private sector.

Third, California's prevailing wage law furthers regulatory, not proprietary, interests. The prevailing wage law is not designed to further California's interest in economic and efficient procurement. Indeed, as the California Supreme Court has recognized, contracting agencies often "have strong financial incentives not to comply with the prevailing wage law." *Lusardi*, 824 P.2d at 649. The primary purpose of the prevailing wage law is instead "to protect and benefit employees on public works projects." *Id.* at 648. As this purpose is plainly regulatory, California's prevailing wage law should be deemed regulatory rather than proprietary in nature. See, e.g., *Gould*, 475 U.S. at 289-91.

CONCLUSION

For the reasons stated above, this Court should reject Petitioners' suggestion that state laws governing government contracting are immune from preemption under ERISA.

Respectfully submitted,

Of Counsel

STEPHEN A. BOKAT
MONA C. ZEIBERG
NATIONAL CHAMBER
LITIGATION CENTER,
INC.
1615 H Street, N.W.
Washington, DC 20062-2000
(202) 463-5337

TIMOTHY B. DYK
(Counsel of Record)
DANIEL H. BROMBERG
JONES, DAY, REAVIS &
POGUE
1450 G St., N.W.
Washington, DC 20005
(202) 879-3939

JAN S. AMUNDSON
QUENTIN RIEGEL
NATIONAL ASSOCIATION
OF MANUFACTURERS
1331 Pennsylvania Ave., N.W.
North Tower, Suite 1500
Washington, D.C. 20004-1790
(202) 637-3058

*Counsel for the Chamber of
Commerce of the United
States of America and the
National Association of
Manufacturers*

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